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No. 85-1112

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FALSTAFF BREWING CORPORATION,
Petitioner,

v.

TRINITY CARTON COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In April of 1970 Falstaff Brewing Corp. operated a brewery in New Orleans. At that time it had under sublease from Trinity Carton Co. approximately ⅓ of a neighboring piece of property known as the Broad Street Warehouse. Trinity in turn had leased the whole of that property from its owner, A. L. Jung and the Broad Street Corporation.

Both leases ran from January 1, 1964 to December 31, 1988. The evidence showed that Falstaff's counsel had

assisted in the preparation of the prime lease, since the parties believed Falstaff would eventually occupy the whole of the property. In anticipation of that probability, Falstaff's counsel, in 1964, had supplied two provisions for the prime lease. The first authorized future subleases to Falstaff. In the second, the landowner authorized future demolitions of the improvements and the erection of new works so long as the new works met a test that Falstaff set out in that provision.[1]

On the ⅓ of the property that Falstaff had occupied since 1964 it had erected a can handling plant. By 1970 its operations had grown to the point that it needed to expand its canning operations into the other ⅔'s of the property.

The negotiations to expand the leased area were conducted between counsel for the two parties, with Mr. Russell Schonekas representing Trinity and Mr. James McClellan representing Falstaff. Those two gentlemen were also the principal witnesses at the trial, and their differing versions of what happened formed the basis of the factual issues submitted to the jury.

Mr. Schonekas testified that the parties quickly agreed to use the basic terms and conditions of the already existing 1964 sublease, for the terms and conditions of the new lease. Falstaff, on page 7 of its petition to this Court now finally concedes that as to all of the boilerplate provisions, but not as to the new lease's term.

On the term of the lease, Mr. Schonekas testified that he and Mr. McClellan discussed term and agreed that all

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[1] That provision of the prime lease reads:

"LESSEE'S RIGHTS FOR NEW CONSTRUCTION: Lessee shall have the right to demolish any portion of the present improvements, provided Lessee builds, at his expense, any improvements thereon that are comparable or better insofar as the appearance, construction and utilitarian value are concerned. Demolition and erection of improvements are to be approved by Lessor, in writing, prior thereto."

Trinity could give Falstaff was the balance of the term that Trinity had on its prime lease. That was, of course, identical to the balance of the term on the Trinity-Falstaff sublease. He further testified, that with agreement on those points, the only sticking point was the rental to be paid.

The parties had a protracted series of negotiations on that one subject. Ultimately, Mr. Schonekas was called by Mr. McClellan who offered $.65 per square foot, net. Mr. Schonekas asked that Mr. McClellan put his offer in writing, and he then received a letter from Mr. McClellan saying:

> ". . . *Falstaff will take a sublease* from Trinity Carton Company of all the property heretofore leased from Broad Street Corporation by Trinity Carton Company other than the property heretofore subleased to Falstaff. The rental *offered* is $.65 per square foot net . . .
>
> ". . . Because of pending negotiations with regard to other property, it is necessary that I put a *deadline* of Monday, April 20, 1970, on the *proposal herein made* . . .
>
> "In the event your people desire to *accept this proposal* . . ." (See Joint Exhibit 8, Emphasis ours).

Needless to say, the letter, written from one attorney to another, with its use of such key words as offer, proposal, acceptance and deadline date, could not have been a clearer offer to contract. Mr. Schonekas took it just that way and accepted it, doing so by both a telegram and telephone conversation. He testified that in that telephone conversation he and Mr. McClellan again discussed tracking the existing sublease, and that the term would be for the balance of its term. He said Mr. McClellan wanted to prepare the document in order to get it out as quickly as possible.

At this point this Court should know that the law of Louisiana recognizes and enforces such agreements—to

be reduced to writing—if the fact finder finds that the parties intended at that point to contract. *Knights of Pythias v. Fishel* (La. 1929), 168 La. 1095, 123 So. 724 and *Kaplan v. Whitworth*, 116 La. 337, 40 So. 723. The jury here, of course, found that they did.

After the acceptance telephone conversation, and unbeknownest to Mr. Schonekas, Mr. McClellan had Falstaff's New Orleans counsel, Lawrence Molony, contact Trinity's landlord directly. He sent Mr. Molony a set of construction drawings for a building Falstaff wanted to erect after demolishing the existing improvements. He asked Mr. Molony to obtain the landlord's approval of those plans and told him to tell the landlord, ". . . precisely the agreement . . ." Falstaff had with Trinity.

That precise agreement with Trinity, however, did not include a word about construction plans or landowner's approval. For, not only did the offer not say a word about such, but Mr. Schonekas testified that for negotiating advantage Falstaff had refused to even discuss its intended use of the premises. That testimony was confirmed by Falstaff's Mr. Molony who testified that Trinity was never made aware of Falstaff's construction plans. Thus, two things are beyond dispute as to Falstaff's quest for landowner's approval of its plans: (a) it HAD NOT conditioned its accepted offer on landowner's approval, (Note: Falstaff, conceding that, relies only on an implied condition of landowner's approval), and (b) Falstaff had, in fact, withheld its plans from Trinity.

At this point, it should now be remembered that by reason of one of the provisions that Falstaff had supplied back in 1964, the landowner had already authorized future demolitions and new constructions. Why then was Falstaff seeking the landowner's approval of the plans it had withheld from Trinity? Well, Falstaff's provision authorized new constructions only so long as they were comparable or better insofar as their . . ." appearance, construction and utilitarian value . . ." were con-

cerned. The existing building was a brick two story building with over 100,000 square feet of space. Falstaff's new building, however, would have been a one story 30,000 square foot corrugated metal building. It thus met not a single one of the three tests of the provision that Falstaff had supplied for the prime lease. Falstaff knew that, but withheld it from Trinity.

Had the proposed building complied with that test the landlord, under Louisiana law, would have been required to give his written consent to the proposed works. *Moore v. Bannister*, 269 So.2d 291 (La. Sup. Ct. 1972). *Associates Commercial Corp. v. Bayou Management, Inc., et al.*, 426 So.2d 672 (1982). Since it did not comply, the landlord was free to deny permission to demolish his building. Falstaff's Mr. Molony testified that the landlord objected to losing a brick building for a corrugated metal one. For that reason he demanded the depreciated value of his building, $241,000.00;[2] a demand he was only entitled to make because Falstaff proposed a nonconforming building.

Falstaff could, of course, have altered its plans or even sought, through Trinity, the enforcement of its new construction rights to the extent it contended its plans conformed. Instead, it sought to abrogate the "agreement" it had with Trinity. Mr. Molony sent Mr. Schonekas a letter saying the deal was off because of Trinity's landlord's demands. Mr. Schonekas took the position that he had an enforceable agreement with Falstaff that was not subject to landowner's approval. He demanded that Falstaff comply with the agreement. When it refused, Trinity sought mitigation tenants and then filed this action.

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[2] Falstaff would paint the landlord as an extortionist using an erroneous tax argument. But, Falstaff's own witness testified that he refused because of the difference in buildings, not a tax argument. App. at 1a.

Falstaff, from the beginning of the demanding stage right up to trial, took the position that its offer as to price was simply preliminary to a much larger agreement and that it did not intend by its offer to enter into a contract. In support of that position Mr. McClellan claimed the parties had not discussed all the usual terms and conditions of a lease, including most importantly, the duration of the lease. He testified he was leaving that issue of term to the end, and that he had to have a thirty year term with a fixed rent, which Trinity could not give.

For its answer, Falstaff filed a general denial. In its sections of the pre-trial order, Falstaff, in support of its contention that it did not intend to contract until a written lease was signed, set out a great number of "facts and circumstances" that it contended supported that conclusion. Landowner's approval was listed as one of those "facts and circumstances" along with the size of the proposed lease; the fact that the prior lease had been in writing; the fact that the parties had litigated against each other; etc; etc. Falstaff did not say there that it had conditioned its offer on landowner's approval; and, of course, it does not even do so today since the offer simply does not contain such a condition.

The Trial Judge instructed the jury on Falstaff's contention that it did not intend to contract, by using Falstaff's pre-trial order language, virtually word for word, right down to listing landowner's approval as a fact or circumstance supporting that contention. The jury, of course, rejected it.

REASONS FOR DENYING THE WRIT

This case simply involves run of the mill jury instruction issues which have long been settled in the law. It presents not a single one of the considerations set out in Rule 17 of this Court's Rules for the issuance of a writ of certiorari, and Falstaff does not even claim that it

does. The application should be denied for that reason. Additionally, the issues complained of by Falstaff were correctly resolved by both the District Court and the Court of Appeal.

I. The Issue of Condition Was Not Tried by Consent.

Falstaff's contention that the issue of condition was tried by consent is simply not true. Falstaff first brought up the condition theory in its proposed jury instructions which it submitted just days before the trial. At the conference to go over the proposed jury instructions, we objected to those condition instructions and we were sustained by the District Judge. That conference was held before the trial even began and thereafter during the trial we certainly did nothing to evidence a consent to trying an issue we had, in fact, opposed.

And, as to Falstaff's claim that we asked that the jury be instructed on conditional obligations, our proposed instructions concerned the fact that Falstaff did not condition its offer on landowner's approval. They asked that the jury be instructed that since Falstaff had not done so it was not entitled to claim that its offer was conditioned on such approval. Surely, by asking that the jury be instructed that there was no condition, we hardly consented to their being instructed that there was or could have been one.

Thus, the issue of condition was hardly tried by consent as Falstaff's trial counsel well knows.[3] (Note: The author of Falstaff's petition to this Court was never before involved in this case, and may well not know what went on in the conference on jury instructions).

Beyond that erroneous argument, Falstaff's petition does not go. Specifically, it does not discuss why its in-

[3] See Page 40a of the Appendix to Falstaff's petition where Falstaff's trial counsel discusses the Trial Judge's earlier decision that the condition issue was not to be tried as an issue in the case.

structions were refused, and that, we think this Court should know. We have therefore included the three proposed instructions (4, 5, & 6) as an appendix to this brief and a quick perusal of them will show that they were objectionable on several grounds.

In the first place, both #4 and #6 were completely impermissible because they sought to instruct the jury on what might have been the case if Falstaff had expressly conditioned its offer on landowner's approval. Since Falstaff did no such thing, and, since the law is clear that instructions should not be given on hypothetical facts, those instructions were properly denied. *Mutual Insurance Co. v. Baring*, 87 U.S. 159 (1873); *Railroad Co. v. Houston*, 95 U.S. 697 (1877); *State Marine Corp. v. John B. Honor & Co., Inc.*, 80 F.2d 277 (5th Cir. 1935)

Falstaff's proposed instruction #5 was really not an instruction on conditions at all but a sort of primmer on what a prime and sublease are which Falstaff wanted given for the purpose of ultimately misstating Trinity's demolition rights. For, in the last paragraph, Falstaff said:

> "Trinity did not have the right under its lease agreement to demolish improvements and erect new improvements without obtaining the written consent of Broad Street."

That, of course, set up the implied condition portion of the next proposed instruction and is, in fact, the whole premise of Falstaff's implied condition precedent argument. But that is wrong, for by reason of the very provision Falstaff had required be included in Trinity's prime lease, Trinity had the right to demolish the buildings, build new ones and require the landowner to approve same, in writing, so long as they met the test set out in that provision. See Footnote No. 1 and *Moore vs. Bannister*, supra. Thus, a proper instruction, instead of

saying that Trinity had no rights, would have had to say:

> Trinity had the right under its lease to demolish improvements and erect new ones and to require Broad Street to consent to same so long as the new works met the test set out in the provision that Falstaff had required be included in Trinity's prime lease.

Of course, the problem—from Falstaff's side—with that is, that its proposed building simply did not comply in any way with its own test. And, since Falstaff had withheld its nonconforming plans from Trinity, and thus could hardly imply its consent to them, Falstaff proposed to instruct on a half truth—Trinity had no rights—to avoid the problems with the whole truth—Trinity had rights, provided Falstaff complied with the provision it had supplied back in 1964. The law, however, is clear that such half truth instructions are not permissible. See *Burns v. Travelers Ins. Co.*, 344 F.2d 70 (5th Cir. 1965); *Cherry v. Stedman*, 259 F.2d 774 (5th Cir. 1958); *Manchester Mill & Elevator Co. v. Strong*, 231 F.876 (8th Cir. 1916). Thus, all three of the proposed instructions were properly denied by reason of their hypothetical and half truth nature.

Absent Falstaff's requested instructions, the question then becomes: were the Trial Judge's instructions nevertheless proper? Here, we have two routes—either Falstaff is correct in its argument that it clearly raised its implied condition precedent defense in its sections of the pre-trial order, or the Court of Appeals is correct in its ruling that it did not do so. Obviously, we think the Court of Appeals was correct, but for the sake of argument let us assume that Falstaff was correct. Then, the Trial Judge's instructions, which quoted Falstaff's sections of the pre-trial word for word, must have been just as clear. And, if Falstaff was so clear, and the Trial Judge used its language, did not the jury also clearly

decide Falstaff's implied condition precedent defense against Falstaff? Obviously so.

Of course, we believe the Court of Appeals was correct in ruling that Falstaff did not, prior to its proposed jury instructions, claim that the landowner's approval was an implied condition precedent to any contract. For, the law is clear that both the existence and non-occurrence of a condition precedent must be specifically and particularly pleaded. Fed. R. Civ. P. 9(c); *Sam's Style Shop v. Cosmos Broadcasting Corp.*, 694 F.2d 998, 1004 (5th Cir. 1983); *EEOC v. Klinger Electric Corp.*, 636 F.2d 104 (5th Cir. 1981). Here, Falstaff simply filed a general denial. Nor, in its sections of the pre-trial did Falstaff even come close to "specifically and particularly" saying anything about there being a condition; much less an implied condition. They simply cited landowner's consent as one of the reasons why they claimed they did not intend to contract until there was a written lease. But, there is a gulf of a distance between saying—I did not intend to contract because of problems you were not aware of—and saying—we agreed to contract on the condition of such and such problem being resolved, and it was not resolved. The former is what Falstaff claimed. It is one sided and has not a thing to do with a condition precedent. (Note: In Louisiana it is called the suspensive condition. La. C.C. Art. 2021). For, under our law, a condition is not a one sided withholding of consent. It is consensual in nature, and by its nature can exist only as part of the contract of which it forms a part. See La. C.C. Art. 2021 and 2028. Falstaff certainly never admitted, even alternatively, that there was a contract here. Instead, it said in clear and unambiguous language, that there would be no contract until the parties reduced their agreement to writing, the parties agreed on term, the landlord approved, etc. It even still takes that position (See, for example, the last paragraph on page 6 of its petition here), and it is simply contrary to saying there

was an agreement subject to the condition that the landowner approved our plans.

In fact, had Falstaff made such a claim, Trinity would have had an easier case. For, as an aspect of the contractual nature of conditions, in Louisiana when a party prevents the fulfillment of a suspensive condition by the happening of which he would be bound, our law considers the condition to have been fulfilled. See La. C.C. Art. 2040, *George W. Garig Transfer v. Harris*, 226 La. 117, 75 So.2d 28. To have availed ourselves of that principal, all Trinity would have had to do was produce an architect to testify that Falstaff's one story, 30,000 square foot corrugated building was not comparable or better than, a two story 100,000+ square foot brick building insofar as construction, appearance and utilitarian value. That, of course, is obvious and thus, had Falstaff set out landowner's approval as a suspensive condition defense, it would have lost the case.

By not setting out that defense, but trying to raise it just two days before the trial Falstaff, of course, deprived us of the ability to have expert testimony, in the form of an architect, available to refute the defense and prove their liability. And, either they set out to keep us from being prepared by craftily drafting their section of the pre-trial order to avoid mentioning the words implied suspensive condition—even in the Contested Issues of Law portion—or the whole subject was an afterthought. We think it was an afterthought and so did the District Court and the Court of Appeals. But, either way, they were not entitled to spring it on us, just days before the trial. *Sam's Style Shop v. Cosmos*, supra; *EEOC v. Klinger*, supra; *Taylor, et al. v. Reo Motors, Inc.*, 275 F.2d 699 (10th Cir. 1960); *Intel Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253 (11th Cir. 1983).

Thus, not only were Falstaff's requested instructions properly refused, but Falstaff was not entitled to instructions at all on a defensive theory it had not timely raised.

Indeed, there can be little doubt that Falstaff was far better off submitting landowner's approval as it did—as a factor relating to its consent. For, otherwise, it risked being bound to the very contract it still argues it never agreed to. Indeed, when it submitted its proposed instructions, Trinity, in addition to opposing them, submitted an alternative instruction on Falstaff being bound by reason of its having prevented landowner's consent via its nonconforming plans. Falstaff opposed that, thus leaving the Trial Judge no choice but to recite only what Falstaff had said in the pre-trial order. That, in fact, got to the jury what Falstaff even today says was a clear statement of its position. Falstaff's problem with it is simply that the jury rejected it.

As to Falstaff's arguments concerning a supposed right to amend its answer after trial, since the condition defense was certainly not tried by consent its case law on that subject is wholly inapplicable. Instead, the Court of Appeals properly treated that issue; pointing out that after the adverse jury decision Falstaff sought to raise all sorts of new defenses, including condition precedent, absence of cause, prescription, etc., etc. It was an obvious effort by Falstaff to overcome the adverse jury decision by simply raising new defenses. That sort of seriatim presentation of defenses has been consistently disallowed by the Courts. *Zenith Radio v. Hazeltine Research, Inc.*, 401 U.S. 321; *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967); *Ford Motor Co. v. Auto Supply Co., Inc.*, 661 F.2d 1171 (8th Cir. 1981).

II. Lease Duration Was Clearly Decided by the Jury.

As Falstaff even points out in its application, there was a major factual disagreement between the witnesses on the question of the duration or term of the lease. Mr. McClellan testified that he wanted a thirty year term with a fixed rent and that the parties had not even discussed term. Mr. Schonekas testified that term was discussed and agreed upon as being the balance of the term

that Trinity had on its prime lease, which of course, was identical to the balance of the term on the sublease. Mr. Schonekas further testified that in his acceptance telephone conversation he and Mr. McClellan again discussed the term being the balance of the term that Trinity had to give.

Falstaff, of course, did not introduce Mr. McClellan's testimony in a vacuum. Its reason for bringing it out was that non-agreement on term was central to its contention that the parties had only agreed on price and nothing else. In its sections of the pre-trial order it clearly set out the issue of agreement or non-agreement on term as a "Contested Issue of Fact" to be tried, saying there was an:

> ". . . absence of any agreement between the parties to:
>
> "i. the *term of* the new lease,
>
> ii. the terms of payment of rent,
>
> iii. the place of payment of rent, . . ." (See Pre-Trial Order Doc. # 25 Rec. Vol. 1 pg. 85)

In presenting this factual dispute for the Jury's consideration, the Trial Judge said:

> "Falstaff contends that there was no consent, because there were many terms and provisions necessary to a sublease of this value which were not discussed by the parties or agreed upon . . .
>
> ". . . Trinity contends that consent was given, because the price and the thing, the premises to be subject to the lease were agreed upon and it was agreed and understood that the additional terms would be the same as those in the 1964 sublease." (Supp. Vol. 1, p. 9, lines 7-15)

The Judge then went on to instruct the Jury about when an agreement to be reduced to writing was enforceable, and then told the Jury:

> "You are to decide if *all* the terms, that is, the details and conditions, were agreed upon and understood by the parties so that there was a complete contract, *and* you are to decide further what their intention was as to the importance of a written lease." (Supp. Rec. Vol. 1, p. 10-11; Emphasis ours.)

Since duration was the principal point of contention on the issue of whether everything was agreed to,[5] the Jury could not have been confused but that to find for Trinity they had to find that term had been agreed upon as testified to by Mr. Schonekas. Since they found for Trinity, the only conclusion is that they found that the parties agreed to use the term remaining on the already existing sublease—until December 31, 1988. See Fed. R. Civ. P. 49(a); *Bank of America National Trust and Savings Assoc. v. Hayden*, 231 F.2d 595, 602 (9th Cir. 1956).

As to Falstaff's arguments that a complete agreement could have been made without reaching agreement on term, because Louisiana law will imply a month to month term if one is not agreed on, that is not the position either Falstaff or Trinity took in the trial of this case to the jury. Both sides took the position that agreement on term was essential, and the jury was not instructed that absent such, a complete contract could have still been reached. Simply put, they knew nothing about the law implying a month to month term, they were told they had to find a "complete contract" on "all" terms, and agreement on duration was the principal point in issue on that subject.

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[5] Falstaff at the top of Page 7 of its petition emphasizes just how central duration was to the incomplete agreement argument by now conceding that the 1964 sublease was to supply all the boilerplate provisions of the new lease, with the sole exception being duration. With that in mind, obviously the Trial Court's instructions on whether "all terms" and a "complete contract" were agreed on related to duration.

As to Falstaff's claim than an 18 year lease was an anomaly because the 1964 lease was a 20 year lease, and if you tracked its terms, then 20 years had to be used, that ignores Mr. Schonekas' clear testimony that he and Mr. McClellan agreed it would be for the balance of the term Trinity had on the prime lease, which was identical to the term on the sublease.

As to Falstaff's effort to make the District Court look silly and sinister by quoting portions of a dialogue between its counsel and the magistrate, and suggesting that the Trial Judge in a private, illicit conversation brought pressure to bear on the magistrate, nothing could be further from the truth. Immediately after the adverse jury decision Falstaff set out to force a retrial of the liability issues. It filed a motion to amend its answer wherein its sought to raise all sorts of new defenses. In its proposed Sixth Defense, it contended that any agreement was but month to month and that damages should be so limited. (Rec. Vol. II, Doc. 80, p. 249) We opposed that motion on the basis, among others, that term had clearly been submitted to the jury by Falstaff and decided by the jury in its general verdict. (Rec. Vol. II, Doc. 87, p. 284). The District Court denied Falstaff's request to so amend its answer. (Rec. Vol. II, Doc. 90, p. 290)

Falstaff, however, persisted. It sought to raise the month to month argument to the Magistrate at a preliminary conference held for the purpose of establishing the issues for the damage trial. We pointed out to him that term had been tried and decided by the jury, and that the Judge had denied Falstaff's motion to amend for that reason. The Magistrate issued two minute entries stating that because of the Judge's denial of the motion to amend, term was not before him, and that the term was the balance of the term on Trinity's prime subleases. (Rec. Vol. II, Doc. #'s 101 and 102, pgs. 302 and 303).

Falstaff still persisted. When the trial before the Magistrate opened Falstaff's counsel argued back and forth

with him that term had not been decided. To be sure of his ground the Magistrate took a recess to discuss Falstaff's arguments with the Trial Judge. Falstaff was well aware that he was doing so. (See Rec. Vol. III, Doc. 117, p. 24) He returned and said term had been decided. Falstaff's counsel still argued with him for 10 pages there, and two days later he argued with him about it for 16 more pages. (See Rec. Vol. V, Doc. 119, pgs. 110-126) It was at the end of that third day and 16 pages of additional argument that the magistrate finally, in exasperation, said he would not discuss the issue anymore. He was not hiding something, he was tired of Falstaff's persistence. And, as to his being initially confused on term, his two minute entries preceeding the trial, and the more than 30 pages of Falstaff's counsel's arguing with him, show that he clearly understood that Falstaff's month to month argument had been rejected by the District Judge. Nor, did he meet the Trial Judge in some back alley in the dead of night to figure out how to save Trinity's case. He went to the Trial Judge with Falstaff's full knowledge because of its unusual persistence. And, the reason he came back and said that term had been decided was because Falstaff had submitted term to the jury. And, the jury, not Judge Cassibry, decided it.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition of Falstaff Brewing Corp. for a Writ of Certiorari.

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January 28, 1986

APPENDIX

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APPENDIX

EXCERPT OF THE TESTIMONY OF LAWRENCE MOLONY

Q. And isn't it also a fact that Mr. Khoorie, Mr. Jung's attorney, who handled the meeting for Mr. Jung, told you that the Jungs' building was a very fine brick building and would be replaced by a metal building, and that they felt that they should have some premium for that difference?

* * * *

THE WITNESS: Yes, among other things, Mr. Khoorie told me that. He also told me—

MR. MORRISON: I object to his answering anything else.

Rec. Vol. VIII, Doc #158,
p. 184 lines 6 through 22

FALSTAFF'S PROPOSED JURY INSTRUCTION NO. 4

Any acceptance of an offer to lease property must conform to the offer in order to create a binding obligation. If you find that Falstaff's offer to lease the property in question was conditioned upon the intervention and execution of the agreement by the Owner, Broad Street Corp., approving the demolition of the existing building and erection of a new building, then Trinity's telegram did not constitute a valid acceptance. Under such circumstances there can be no contract and you must return a verdict for the defendant, Falstaff.

La. Civil Code Art. 1805

FALSTAFF'S PROPOSED JURY INSTRUCTION NO. 5

A lease is a contract whereby an Owner of property consents to give another party, called the Lessee, the use of property for a specified period time for a certain fixed price, which the Lessee obligates himself to pay.

A sub-lease is a contract of lease between a lessee of property and another, called the Sub-Lessee, whereby the Lessee consents to give the Sub-Lessee use of the leased property for a specified time and for a certain fixed price, which the Sub-Lessee obligates himself to pay.

The rights of Sub-Lessor are less than those of an Owner since the contract between the Owner and Lessee determines what rights the Lessee has. A Lessee cannot grant to a Sub-Lessee any greater rights than he possesses under his original lease with the Owner.

In this case, the Plaintiff, Trinity, was a Lessee of Broad Street Corp., which was Owner of the property. Falstaff was a Sub-Lessee of Trinity. Falstaff was aware of and familiar with the terms of the written lease which existed between Broad Street and Trinity.

Trinity knew that Falstaff's purpose in sub-leasing additional space from Trinity was to erect a can manufacturing plant. This could not be done without complete demolition of the existing building. Trinity did not have the right under its lease agreement with Broad Street to demolish improvements and erect new improvements without obtaining the written consent of Broad Street. This provision in the original lease was binding upon Falstaff, as Sub-Lessee. Falstaff could not demolish existing improvements and erect new improvements without the written consent of Broad Street.

Scott v. Kalip, 197 So. 556 (2nd Cir. 1940)

Miles v. Kilgore, 191 So. 556 (2nd Cir. 1939)

Cole v. Leigh, 36 So.2d 68 (2nd Cir. 1948)

FALSTAFF'S PROPOSED JURY INSTRUCTION NO. 6

A Contract is an agreement which creates an obligation.

A lease or sub-lease is a type of contract.

No contract is effective without the mutual consent of both parties to all of its terms. There is usually something proposed by one party and accepted by the other party. The parties must unite on all the terms. If there is lack of agreement on some terms there is no contract. One cannot make a binding contract by accident.

Any party may condition his consent to an agreement upon the happening of an event or upon the action of a third party. In such a case the agreement will not become effective or enforceable until the happening of the stipulated event or until the third party has acted in accordance with the understanding of the parties.

For example, a person can agree to buy a house if the owner will have it painted red. The agreement to purchase is conditioned upon the painting of the house. Until this event occurs there is no obligation to buy the house.

Conditions are *express* conditions when they *appear* in the contract. Conditions are *implied* conditions when they result from the nature of the contract, the relationship of the parties or the intent of the parties.

If you find that the agreement between the parties in this case was conditioned upon the Owner of the property, namely, Broad Street Corp., giving its written consent to the demolition of the existing building so that a new building, could be erected for Falstaff, then the proposed Sub-Lease between Trinity and Falstaff could not be complete and effective until such written consent by Broad Street Corp. was obtained.

If you find that the agreement between Falstaff and Trinity was conditioned upon its being reduced to writ-

ing and signed then the proposed Sub-Lease could not be complete or effective until it was written and executed by the parties.

La. Civil Code Arts. 1761, 1766, 1805, 2021,

Blaushild v. Rockhold, 7 La. App. 709 (1927).

Mire v. Haas, 174 So. 374 (La. App. 1937).